

An ABSTRACT of a TREATISE, Intituled,
FREE PARLIAMENTS

WRITTEN

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In Defence of the Proceedings of the HOUSE of COMMONS,

IN THE CASE OF

ASHBY and WHITE. With some Additions,In DEFENCE of their COMMITMENTS, and other Proceedings on the late
Writs of *Habeas Corpus*, and Writ of Error.

The Fourth Edition.

THE Grand Question in the Case of *Ashby and White*, on which all the other Questions concerning the Five *Alsbury-Men* do depend; is, Whether the House of Commons have not a Privilege to be sole Judges of the Behaviour of the Sheriffs and other Officers, who are to take the Poll on the Election of Members to serve in Parliament, in all Cases not particularly provided for by Act of Parliament: that is, Whether the Commons are not sole Judges of the Rights of their own Electors, so far as relates to their Right of Voting in Election of Members to serve in Parliament, and of determining, who are, and who are not qualified to give their Votes in every such Election. And whether the Officers that take the Poll have done their Duty in that Particular or not: For if the Commons are sole Judges in these Cases, then the Determination thereof cannot be brought into Westminster-Hall by any Action at Common Law, nor before the House of Lords by Writ of Error, or otherwise; neither can the Commitments of the Commons for such a Contempt to the Jurisdiction, and Breach of the Privilege of the House of Commons, be discharged by any other Authority besides their own, they being sole Judges in the Case, exclusive of all others.

The Commons do not intermeddle with the Rights of their Electors, in any other respect whatsoever. If an Elector be injur'd by another, either in his Person or Freehold, if he be Wounded, Beaten, or Assaulted, or any wise wilfully Obstructed or Hindered to come to the Place of Voting, and to offer or pronounce his Vote for any of the Candidates. The Commons do admit, that the Elector may have an Action at Common Law, they do not desire to be Judges of any such Cases: But when a Vote is offer'd by an Elector, and not taken upon the Poll by the proper Officer, Whether this Officer (who is in this particular Case their Servant) has done his Duty or not? And, Whether that Vote was a Legal Vote or not? The Commons claim the sole Determination thereof, by the Law and Custom of Parliament, as being incident to the Trial of every Election, absolutely necessary to preserve the very Being of a Free Parliament, and without which, the People of England (by whom they are Entrusted) can no longer remain a Free People.

This is the Case of *Ashby*, who was not wounded, beaten, assaulted, or hindered from coming to the Place of Election; for he did come there, was permitted quietly to offer and pronounce his Vote for Sir *Thomas Lee*, and *Simon Mayne*, Esq; but the chief Officers of *Alsbury* understanding that *Ashby* was a poor Clobber turn'd Ostler, not Legally settled there, but at that time under Prosecution, for removing him out of the Parish; and the Officers being upon their Oaths, and under a great Penalty, to do equal Justice to all the Candidates: And being satisfied that *Ashby* was not a Legal Inhabitant of *Alsbury*, qualified to Vote in the Election of Members for that Borough, did refuse to enter his Name on the Poll; and for this Omission or Refusal, the Action was brought. To which the Defendants being advis'd to make no Defence at the Trial at Law (because the Determination of that Point did belong to the House of Commons) a Verdict of Course was found for *Ashby*; and on a Return thereof to the Queen's Bench, the Court adjudg'd, that no such Action could be brought at Common Law, because the House of Commons had the sole Judicature of the Behaviour of the Officers, and of all Matters relating to the Election of their own Members: But the same, by a Writ of Error, was brought into the House of Peers, and there it was adjudged to the contrary, that the Action did lie, and Judgment was accordingly given for the Plaintiff. Whereupon the House of Commons came to Resolutions as the Judgment of that House; That According to the known Laws and Usage of Parliament, the Qualification of an Elector was not Cognizable or Determinable elsewhere, then before the Commons of England in Parliament assembled, and that whoever shall presume to Commence or Prosecute any Action, Indictment or Information to the contrary, are guilty of a Breach of the Privilege of that House; The Five Men of *Alsbury* were served with these Resolutions, and afterwards it was resolved as followed.

That it appears to this House that John Paty of *Alsbury* has been guilty of Commencing and Prosecuting an Action at Common Law against William White, and others, late Constables of *Alsbury*, for not allowing his Vote in the Election of Members to serve in Parliament, contrary to the Declaration, in high Contempt of the Jurisdiction, and in Breach of the known Privileges of this House. Resolved, That John Paty be for his said Offence, committed Prisoner to her Majesties Goal of Newgate: The like Resolutions were made against the other Four *Alsbury* Men guilty of the same Offence.

They that argue for the Prisoners, Insist,

I. That the Elector is, in this Case, deprived of his Vote by the Default of the Officer, in not entering the same upon the Poll.

II. That this Omission in the Officer, is to the Damage of the Elector.

III. That for such Default in the Officer, there is no Remedy to be had in the House of Commons. And therefore,

IV. That the Elector is Intituled to an Action at Common Law, for Recovery of Damages.

To this the Commons Answer,

I. That the Elector is not deprived of his Vote, by such Refusal of the Officer.

II. That this Omission in the Officer, is not to the Damage of the Elector.

III. That

III. *That for such Default in the Officer, there is a proper Remedy in the House of Commons.* And

IV. *That the Elector is not intitled, in this Case, to an Action at Law for Recovery of Damage.*

And having answer'd all the Arguments for the Action, we go on to prove the sole Jurisdiction of the Commons, in the Case above-mention'd, and then justify their Commitments and all other their Proceedings upon the Writs of Habeas Corpus, and Writ of Error.

1. *The Elector is not deprived of his Vote by such Omission of the Officer.*

This is proved by the *Law and Custom of Parliament*, by which it is declared and established, and so adjudged on the Determination of all Elections in the *House of Commons*; that a Vote that is Offered and Refused, is as good, as a Vote that is Offered and Received: For if the Elector offers his Vote, the Law takes it, tho' the Officer be wanting in his Duty.

This Law is founded on great Reason, for the Safety of the Electors and of the whole Constitution. For the Safety of the Electors, that it may not be in the Power of the Officer to take from them what is Incident to their Free-hold, and essentially necessary to the Preservation of it; for the Safety of the Constitution, that the Commons may have Power to do Justice to the Candidates, and to fill their House with Legal Representatives, on whom depend the Rights and Liberties of all the Commons of England.

If Votes that were Offered and Refused, were not of Validity at the time of the Election, the Commons could not determine that the Candidates, who petition for Relief, on such Refusal, were duly elected by Majority of Legal Votes, and thereby fill their House with proper Representatives for the Common Safety: But the Persons returned by Corruption or Bribery (who had the Majority without the rejected Votes) would continue to sit in Parliament, to the great Hazard and Prejudice of the Electors, and the whole Constitution.

The Receiving and Entering of Votes on a Paper, upon the Poll, is not a Qualification for every Vote, but a Formality appointed by the Parliament, for the better Discovery of any Default in the Officer; and if he should make a Return without taking down any of the Electors Names on the Poll, that would not avoid the Election or the Votes. It is indeed an Offence, yet not to the Parties, but to the Parliament; and upon Proof made of the Electors Votes, they would all be allowed as Legal, tho' not one of them were entred on the Poll: And therefore

2. *This Omission in the Officer is not to the Electors Damage.*

This is a plain Case; for if the Elector is not deprived of his Vote, as hath been demonstrated, this Omission in the Officer is not to the Electors Damage.

It hath been nicely observed, that the not taking an Elector's Vote on the Poll, is a Discredit; but to whom? to the Elector who hath done his Duty, or to the Officer who hath not? It is certainly a great Discredit to the Officer, who is upon his Oath to do equal Justice, to refuse to take down the Vote of a Person, who is well known to all his Neighbours to be a Legal Elector; but it is none to the Elector, who is not answerable for the Default of the Officer: But if it were, it is not to his Damage, which is the Point in question. And

3. *For such a Default in the Officer, there is a proper Remedy to be had in the House of Commons.*

An Officer that refuses to take down the Vote of a Legal Elector on the Poll, is guilty of a great Offence to the Parliament, in breach of his Oath, and in disobeying their Orders; And this Offence being of a publick nature, and committed by him in the Service of the Parliament, hath ever been punishable by the House of Commons by Imprisonment, or otherwise; of which there are innumerable Instances in the Journals of that House: And this may be done on the Petition of any one or more Electors. But in regard Electors are generally contented, if they have their Legal Representatives; and if they have not, they will have Justice done them at the Expence of the Candidates; Complaints of this nature are very rare from single Electors. But I remember there has been (from this very Town of Aylesbury) a Complaint made to the House by three Electors against the Officers for such a default.

The Remedy in the House of Commons is very proper in every respect: For if the Electors that complain, have the Representatives returned for whom they offered their Votes, then the Punishment of the Officer is the proper Remedy. If such Representatives are not returned, then the proper Remedy is, that not only the Officer be punished, but that the Electors have their Votes allowed to them, and that the Return be amended accordingly; all which is done on the Trial of every Election in the House of Commons. But nothing of this kind can be done at Common Law, and therefore the Action at Law is not a proper Remedy in any respect. It is not just and equal that the Officer should pay Damage to one that has not suffered any; neither is it proper that a publick Offence should be punished with a private Satisfaction; which can no wise prevent the Evil, allow the Vote, restore the Legal Representative, or preserve the Constitution; all which is the proper End of Voting, by reason of their Freehold, and Freedoms, and for the Preservation of Free Parliaments, the great Bulwark both of Liberty and Property. But all these Ends are answered by the Remedy in the House of Commons, which is very just and equal, adapted to the Nature of the Offence, most likely to prevent the Evil thereof, and most advantageous for the publick Safety.

4. *The Elector is not intitled in this case to an Action at Law for Recovery of Damages.*

This is evident by what hath been said: For if the Elector be not deprived of his Vote, as hath been demonstrated, he cannot be entituled to an Action at Law for Recovery of Damages. By all which it appears, that the Judges at Common Law were in the right, that no such Action did lie, and that the Lords founded their Judgment on a Mistake, that the Elector was deprived of his Vote, when he was not; and that for such a default in the Officer, there was no Remedy in the House of Commons; whereas in truth they have a Remedy there, and no where else. This is farther demonstrated by the Reasons and Authorities following, viz.

5. *The House of Commons are sole Judges of the Behaviour of Sheriffs and other Officers in taking down the Electors Votes on the Poll, and whether those Votes were Legal or not.*

Every Court in the Kingdom are Judges of their own Privileges, and of the Behaviour of their own Officers, and the publick Officers are in Law the proper Officers of every Court, according to the Writs and Commands they receive. If a Writ or Process issue forth of the Exchequer, the Officers that execute those Writs, and make their Returns thereupon, are their Servants, and accountable to them: If out of the Common Pleas, they are their Servants; if out of the Queens Bench, they are their; and if the Writs concern the Members to sit in Parliament, they are the Officers of the Parliament. Thus the Sheriffs, Mayors, Bailiffs, and other Officers, as to all Matters relating to Parliament, do act as Officers of the Parliament, and are accountable to none but them. The House of Commons exercise in these Cases an immediate Jurisdiction over them: If the Return be too slow, they send an Order to the Sheriff, or if faulty, take him into Custody, as for a Breach of the Privilege or Service of that House. The Court of Chancery is only the Repository for such Writs, by an Act of Parliament; but that Court does not meddle with the Returns, or the Sheriff, nor issue out a new Writ, but by Warrant from the Speaker of the House of Commons.

This Law is founded upon great Reason; and even upon the necessity of preserving thereby the Constitution of Parliaments; for if the Commons wanted Power to punish those Officers, or in case any other had Power so to do besides themselves, in cases relating to Elections, they could never be sure of fair Returns, or a Free Parliament.

It will be dishonourable to Parliaments, as a Learned Judge observes, that there should be no Protection in their Service; no body can serve them chearfully and willingly at that rate, and to have others judge when their Servants do well or ill, will be to have others give Rules to their Servants and Service, which will not be convenient. But on the contrary, it would be destructive to the Freedom of Elections, and tending to subject the House of Commons to the Power of other Courts.

If the House of Commons were not the sole Judges in this case, both the Electors and Officers would be in a miserable Condition; for the Electors might be deprived of Free Parliaments, to protect their Freedoms; and the Officers might be twice punished for the same Offence, first by the Commons, and afterwards by the Judges at Common Law; which is contrary to a Fundamental Maxim of the Law of England, that says, *Nemo bis puniatur pro eodem delicto*. Nay, they will be in such a condition, That whether they do discharge their Duty, or not, they may be utterly ruined and undone: For if a hundred Men offer their Votes, who have no Right so to do, the Officer must either accept or refuse; if he accept, he forfeits 500 l. on the Statute for a false Return, if he refuse, he is prosecuted by a multitude of Vexatious Actions, which must all be defended at the single Expence of the Officer, and whether he has Judgment for him or against him, may be the Ruin of himself and Family; especially if such Actions shall be removed into the House of Peers, and Judgment there be given against him, as it was in the Case of *Ashby and White*: And yet these Actions are supported, by some Persons, as if that very thing were absolutely necessary to preserve the Property of the Subject, which tends to the Destruction of

Free Parliaments depend entirely on free Elections; but no Elections can be free, if there be any Terror on the Electors or on the Officers; for as the Electors must not be hindred by Force or Threatnings, but must be free to come to the Election, and to offer or pronounce their Votes to the proper Officer, for which of the Candidates they please; so the Officer must not be terrified with a Fear of a Multiplicity of vexatious Suits, but must be free to act indifferently, as a Judge, in the Management of such Elections, according to his Oath, and Duty of his Office, and as well to reject the bad Votes, as to receive the good; and ought not to be accountable to any, but to those whose Officer he is for that purpose, and with whom are intrusted the Preservation of the Freedom of Elections, and of all the Rights and Liberties of the Commons of England.

They that have Power to punish the Officers, have Power to influence them in the Return of Members to serve in Parliament; and if an Action will lie, an Information will also lie, for the Misdemeanor of his Office; if it may be punished at the Suit of the Party, it may be punished at the Suit of the Prince: If so, where is the Officers Security? He may be found guilty by a Jury of the adverse Party; he may be punished 20 Years hence, and who can tell what Damages or what Fine may be set upon him? Will not this Terror make him desire to please them that are to be his final Judges, rather than do Right? And will not this be dangerous to the Constitution of Parliaments, and put the Commons in the power of the Lords.

The Lords and Commons have ever agreed that it is an Antient Fundamental Maxim of the Law and Custom of Parliament (which is the Highest and Noblest Branch of the Law of England, and particularly adapted to the Preservation of the Liberties of this Kingdom,) That the Two Houses are Independent of one another, and sole Judges of their own Priviledges; and the Commons insist that it is the first Fundamental Priviledge of the Commons of England to chuse Members to represent them in Parliament, this is the Foundation of all their Priviledges; and as the House of Commons stand in the Place of their Electors in all other Respects, so in this also, to be sole Judges, who have a Right to chuse such Representatives; or else they can never be secure of a right Judgment, and that illegal Representatives shall not be Imposed upon them to the Ruine of the Constitution, and the Destruction of their Liberties.

There is a great difference between the Rights of the Commons of England in their Private and their Publick Capacities; for tho' the Private Differences of the Commons, concerning their Freeholds and Freedoms are submitted to the Determination of the Judges of Westminster-Hall, as Persons Indifferently chosen and appointed by the Prince, to do equal Justice to all his Subjects; yet they never submitted the Fundamental Rights of the Commons of England in general, and in their Publick and Politick Capacities, as they are a free Branch of the High Court of Parliament, to the determination of any other but their own Representatives.

This Appears not only by the Law, Custom, and constant Usage of Parliament, but by the very Frame and Nature of our Constitution, which requires that, no Law be made to bind the Persons or Property of the Subject without their own Consent in Parliament, and as there is no Law extant, nor any such attempt ever made before, so it cannot be imagined, that Five Hundred Men in their right Senses, could ever give up that Priviledge, without which they could not maintain any other Priviledge whatsoever, nor in any Respect remain a Free People; for whoever has a Judicature in this Case over the Rights of Electors, has a Power over the Commons; and consequently may dispose of them and their Priviledges as they please.

This is a Matter of Parliament, and therefore not Cognizable elsewhere, it is a Matter of the House of Commons, and not of the House of Lords, and therefore solely Cognizable in the House of Commons; and if this be the Case, as really it is; and I hope made plain to the meanest Capacities; then it will be also Evident to them, that the Commons have in all Respects discharged their Duty to their Country with great Fidelity, and Unbias'd Judgments.

If the Commons have a Priviledge to Judge of the Behaviour of Officers in this Case; and they are and ever have been sole Judges of their own Priviledges; then the Determination of such Cases cannot by any New Device, or Artifice whatsoever, be brought to any other Judicature; but all the Proceedings in order thereto, must be Null and Void, and *Coram non Judice*; and not only so, but the Attempt to set up another Jurisdiction, in opposition, and even to the overthrow of the Legal Authority of the House of Commons, must be the Highest Breach of the Priviledge of that August Assembly, especially after the Commons had given fair Notice of their Undoubted Right by the Law and Custom of Parliament.

The Offence of *Ashby* might be committed thro' Ignorance, because the Law of Parliament is not Universally understood, and therefore notwithstanding every Subject is bound in strictness to take notice of the Priviledges of Parliament: Yet the Commons took Pity of an Ignorant Man, and remitted the Punishment; but the offence of the Five Men of Alsbury, was committed after they were served with the Resolutions of the Commons, and therefore was a wilful and notorious Offence, in contempt to the Jurisdiction, and Breach of the Priviledge of all the Commons of England, in which their very Being depends, as a Free People.

How then can the Commons be blamed for committing such Offenders? Was it not their Duty so to do? Are not such Commitments usual in such Cases? and the proper way to preserve the Priviledges of the Commons?

mons? And can such Commitments be discharged by any other Authority? Ought not Offenders in such Cases to pay as much respect to a House of Commons, as to an Inferiour Court in Westminster-Hall? Must they not in all Cases of Contempts, Petition, Submit, and beg Pardon of the Court to whom they gave the Offence? Is not a Discharge of the Commitments of the Commons, in such Cases, a discharge of their Priviledges too? Will any Habeas Corpus lie to discharge an Execution upon a Judgment? Was not this the Judgment of the Commons of England in Parliament Assembled, that those Men should be punished for their Offence by Imprisonment, during the Session of Parliament, or until they made their Submission to the Commons? And can this Judgment be discharged by an Inferiour Court? And are not Cases of this nature excepted in the Act of Habeas Corpus? What Colour then was there for such a Proceeding? And when the Lord Keeper, and all the Judges had unanimously declared that Offenders could not be discharged, that were committed for a Breach of Priviledge of the House of Commons, and they by a solemn Judgment asserted and declared that they had a Priviledge in this Case, and had good reason so to do, as is plainly proved, What could the Gentlemen of the Long Robe mean, by proceeding farther in that Matter? And by arrainging the Proceedings of the Commons in an open Court, with the greatest Licentiousness of Speech; they themselves then sitting in dispatch of the Publick Supplies, and other weighty Affairs of the Nation: Never was a greater Indignity offered to the High Court of Parliament; for as famous Judge Dyer, p. 60. expressly tells us, in the Case of *Tremward*, The Judgment of the House of Commons in all Cases Cognizable before them, is the Judgment of the most High Court of Parliament: For tho' the Power is distributed; yet as King H. 8. said in the Case of *Ferrers*, The King as Head, and the Two Houses as Members, are knit together in one Body Politick, so as whatsoever Offence or Injury is offered to the meanest Member of either House during time of Parliament, is to be Judged as done to the Kings Person, and the whole Court of Parliament; and Sir Edward Montague, the Lord Chief Justice then present, confirmed all that the King had said; and it was assented to, by all the rest of the Judges of England; Now, says Sir Robert Atkins in his learned Argument, If you Bruise or Pierce the Hands, (and the House of Commons may well be compared to the Hands; for they have been the Liberal Hands; and the Hands feed the Head) the Head and all the rest of the Body must quickly be sensible.

It appears by several Authorities, particularly by Two Records, M. 12. E. 4. and H. 13. E. 4. in the Office of the Pleas of the Exchequer, that the Priviledge of the Lords in one Case, and the Priviledge of the Commons in the other, were both laid and claimed as one Entire Priviledge, and so own'd by all the Judges of England, and thus it is the joint Priviledge of both Houses, that each House shall be sole Judges of their Respective Priviledges; and whoever destroys that Priviledge in one House, destroys it in both; since both do stand on the same Foundation; It is pulling our Constitution to pieces; it is destroying the greatest Security of the Subjects of this Kingdom; for thus the Lords declared in the great Conference on the Bill for Impositions on Merchandise, That it was the greatest security of all the Subjects of this Kingdom, that the Two Houses do by their Constitution, not only give Assistance, but are Mutual Checks to each other; but if the Priviledges of the Commons can be brought to the Determination of the Inferiour Courts, and from thence by Writ of Error into the House of Peers, the Commons will neither be able to give Assistance, nor be a mutual Check to the Lords for the Common Safety; It is giving up the whole Constitution at once; and certainly, if sending a Letter to a Peer, or a Subpœna to a Commoner to appear in Chancery, be a breach of Priviledge of Parliament: The endeavouring to set up a New Action contrary to the Law of Parliament, and to the Fundamental Rights of the Commons of England, is an Offence of a much Higher Nature, as the Consequence is much more dangerous to the Publick Safety.

It is yet an Aggravation to pursue such Methods in an undecent and reproachful manner: I will not use my own Words, but the Words of a Learned Judge on the like occasion: It carries with it a very high Reflection upon that Great and Solemn Assembly, to entertain a Thought so mean and so dishonourable of the Supreme Court of the Nation, which is to correct the Errors of all other Courts, that they should be guilty of Injustice and Partiality. Chief Justice Brook and Justice Saunders say in *Plowden's Comment.* 175. Injustice may not be presumed of a Parliament. And in the Earl of Leicester's Case, fol. 398. The Parliament is a Court of very high Honour and Justice, of which no Man ought to imagine a thing dishonourable. And Sir Rob. Atkins says, We easily agree a Parliament may err, for they are not infallible; but the Law hath provided a Remedy against those Errors, and a way to reform them. A subsequent Parliament may reform the Errors of a preceding Parliament: But to say they will be partial or unjust, or do any thing out of Malice, is to raise a Scandal upon the whole Nation, whose Representatives they are. And is it a Crime in the Commons to commit such Offenders, as have raised a Scandal on the whole Nation? Have not much greater Punishments been inflicted for Indignities offered to inferior Courts, or dishonourable Words spoken of them, or their Proceedings? And if they commit, no inferior Court can discharge, by Habeas Corpus, or otherwise.

If the Priviledges or Proceedings of the Commons cannot be tried or brought to Judgment in any Inferiour Court, if all Proceedings and Judgments in such case are null and void, and *coram non Judice*, as has been demonstrated, how can any Writ of Error lie on such Proceedings? 1st, Because there is nothing to be removed, for the Judgment below is null and void. 2dly, Because the Commons are sole Judges, and the last Resort in Cases properly cognizable before them, as the Lords claim to be, in cases proper for them. The Commons cannot but protest against any such Action, whilst they remain a Free Parliament. It cannot be conceived that ever a House of Commons will yield up this Point, because whenever they do, they yield up all.

It is not therefore material in this case, whether a Writ of Error be a Writ of Right, or a Writ of Grace, if it be demonstrated that no Writ of Error lies to bring their Priviledges and Proceedings to the Judicature of the Lords. But if a Writ of Error be a Writ of Right in all Cases whatsoever, especially on all Acts and Interlocutory Orders of Judges, it will be welcome News to the Criminals, that may delay their Executions; but not to the Crown or the Commons, since the Prerogatives of the one, and the Priviledges of the other, may by such means be brought to the sole Determination of the Lords.

I will conclude this Discourse with a famous Record out of the Parliament Rolls, 27 E. 3. Num. 9.

Among the Petitions of the Commons, one is, They pray the King, that he will require the Arch-Bishop, and all other the Clergy, to pray for the Peace and good Government of the Land, and for the King's Good will towards the Commons. The King's Answer is, The same prayeth the King. And as a Learned Judge adds on another occasion, I wish with all my heart it were the Common Prayer, not only to Pray for the Good-will of the Prince, but also of the Lords towards the Commons; that they may not endeavour to take that from them by a Judgment, which has been obtained with so great Expence and Difficulty.

I have but one Prayer more to make, and that is, That the People of England will take care to preserve their Liberties by chusing good Representatives.

